No. 95-1028

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

ROBERT FADEM and MARY O. FADEM,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT MARY O. FADEM

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QUESTION PRESENTED

Whether the 12-year statute of limitations applicable to actions against the United States brought under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a(g), is subject to equitable tolling.

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
Reasons for Denying the Writ	4
A. The Inapplicability Of The *Knapp* "Contours" Doctrine, Not The Applicability Of Equitable Tolling, Was The Basis For The Ninth Circuit's Decision.	5
B. No Conflict Among The Circuits Exists As To This Issue	6
C. The Issue Does Not Otherwise Present A Compelling Federal Question.	7
D. This Court Should Not Review *Irwin*.	8
1. This Court Previously Considered And Disposed Of Petitioner's Contentions In *Irwin*.	9
2. *Block* And *Mottaz* Are Neither Controlling Nor Persuasive.	10

Contents

Page

3. *Webb* Makes The Distinction Between Tax Refund Cases And The QTA Clear. 11

4. Petitioner's Concern That *Irwin's* Application Will Unduly Expose Petitioner To Stale Claims Is Unnecessarily Alarmist. 13

Conclusion 14

TABLE OF CITATIONS

Cases Cited:

Block v. North Dakota, 461 U.S. 273, 75 L. Ed. 2d 840, 103 S. Ct. 1811 (1983) 6, 10

Braxton v. United States, 500 U.S. 344, 114 L. Ed. 2d 385, 111 S. Ct. 1854 (1991) 5

Brockamp v. United States, 67 F.3d 260 (9th Cir. 1995) 6, 14

Git v. Dept. of the Treasury, 1996 U.S. App. LEXIS 86 (8th Cir. Jan. 4, 1996) 13

Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 112 L. Ed. 2d 435, 111 S. Ct. 453 (1990) .. 4, 5, 6, 8, 9, 10, 11, 12, 13, 14

Knapp v. United States, 636 F.2d 279 (10th Cir. 1980) .. 4, 5

Contents

Page

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991) 11, 12

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985) 12

Oropallo v. United States, 994 F.2d 25 (1st Cir. 1993) .. 6, 7, 11

Park 'n Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 83 L. Ed. 2d 582, 105 S. Ct. 658 (1985) 12

Soriano v. United States, 352 U.S. 270, 1 L. Ed. 2d 306, 77 S. Ct. 269 (1957) 10, 12

Rice v. Sioux City Cemetery, 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1954) 4

Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974) 4

United States v. Dalm, 494 U.S. 596, 108 L. Ed. 2d 548, 110 S. Ct. 1361 (1990) 11

United States v. Mottaz, 476 U.S. 834, 90 L. Ed. 2d 841, 106 S. Ct. 2224 (1986) 6, 10

Wainwright v. Witt, 469 U.S. 412, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985) 5

Webb v. United States, 66 F.3d 691 (4th Cir. 1995) 6, 7, 8, 11, 12, 13, 14

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2409a(g) ..... i, 1, 12

Rule Cited:

Supreme Court Rule 10 4

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit ("Ninth Circuit"), which is the subject of the petition by the United States of America ("Petitioner") and this brief in opposition by Mary O. Fadem ("Respondent"),[1] is reported at 52 F.3d 202 and attached to Petitioner's brief at Appendix A, 1a-12a. The opinions and orders of the district court granting Petitioner's motion to dismiss, which Respondent appealed, are unreported but are attached to Petitioner's brief at Appendix E-I, 30a-49a. Other opinions of the Ninth Circuit relating to this matter are attached to Petitioner's brief at Appendix B-D, 13a-29a, and Appendix J, 50a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). After two extensions, outlined in Petitioner's brief, Petitioner filed its brief on or about December 26, 1995. Because of the death of Robert S. Fadem, Respondent sought an extension to file this brief in opposition on January 22, 1996. This Court granted Respondent an extension to February 29, 1996.

STATUTES INVOLVED

Title 28 of the United States Code, section 2409a(g) provides:

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the

1. Robert S. Fadem, her husband, cannot file or join in a brief in opposition because he passed away on December 23, 1995.

date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

STATEMENT OF THE CASE

This is a quiet title action to settle a boundary dispute between two property owners of adjacent properties. One of the property owners is Respondent, a widow who, with her recently deceased husband, purchased their property forty (40) years ago in 1956. The other property owner is Petitioner, the government.

Between 1956 and 1963, Respondent and her husband sought to determine their eastern boundary (Petitioner's western boundary). Virgil Bottini ("Bottini"), area manager of the Bureau of Land Management ("BLM") and Petitioner's representative, misled Respondent and her husband into believing that they owned the disputed property. Bottini provided and showed Respondent and her husband a survey map to confirm their ownership of the disputed property.

In 1963, Petitioner commenced construction of a road on the disputed property which Respondent and her husband believed to be theirs. They objected to the apparent encroachment but later permitted it after Petitioner promised to survey the land and to compensate Respondent and her husband if the survey showed that the road was on their property. Petitioner never fulfilled those promises.

Years later in 1970, the Secretary of the Interior pledged to Respondent and her husband that a "cadastral survey" would be conducted to resolve the boundary dispute. Instead, Petitioner simply conducted a "dependent re-survey" of the area. The re-survey showed that the disputed property is actually Petitioner's

property. This re-survey, however, was not validated until 1980 when it was approved by Petitioner.[2]

Without notifying Respondent and her husband that the original survey, on which Bottini made misrepresentations and on which Respondent and her husband relied, was defective, Petitioner began treating the disputed property as its own. Respondent and her husband first learned of the re-survey results in 1983 when they observed Petitioner apparently trespassing and removing culverts from the disputed property.

Respondent and her husband then filed various lawsuits against Petitioner, including this one in 1988, to resolve the boundary dispute. Petitioner moved for dismissal in the district court, arguing that the action was time barred by the QTA because Respondent and her husband had constructive notice of Petitioner's claim more than twelve (12) years before the lawsuit. Petitioner further argued that equitable estoppel or tolling cannot be applied to the statute of limitation imposed by the QTA. Petitioner contended that, even if Petitioner misled Respondent and her husband to the extent required to justify application of equitable principles, Respondent and her husband could not maintain their meritorious claim because Petitioner is the government. The district court agreed.

Respondent and her husband appealed this open injustice to the Ninth Circuit, which reversed and remanded. *Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995). The Ninth Circuit found that Respondent and her husband did not have

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2. In 1987, upon the protests of Respondent and her husband that the 1980 dependent re-survey results were defective, Petitioner confirmed the defectiveness, suspended the results, and authorized a "corrective dependent re-survey." The corrective re-survey was conducted in 1988 and was not approved until 1990, two years after this case was filed.

constructive notice of Petitioner's claim until 1980 when the re-survey was approved. *Id.* at 206-07. The Ninth Circuit found the district court erred in applying the "contours" doctrine established by *Knapp v. United States*, 636 F.2d 279 (10th Cir. 1980), because, unlike the deed in *Knapp*, there was no evidence in this case to support a claim that Respondent and her husband knew or should have known that Petitioner claimed the disputed property. *Fadem*, 52 F.3d at 207.

The Ninth Circuit also noted that the district court erred in refusing to apply equitable tolling because Petitioner had not rebutted the applicable presumption of equitable tolling established in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 112 L. Ed. 2d 435, 111 S. Ct. 453 (1990). *Fadem*, 52 F.3d at 205-06.

Petitioner now asks this Court to exercise its certiorari jurisdiction on the issue of whether the QTA's statute of limitation is subject to equitable tolling. Petitioner asks the Court to reconsider the clear language of *Irwin* and rule that courts do not have the power to apply longstanding equitable principles in actions brought under the QTA.

REASONS FOR DENYING THE WRIT

This Court's exercise of certiorari jurisdiction is discretionary and depends on numerous factors other than the perceived correctness of the judgment the Court is asked to review. *Ross v. Moffitt*, 417 U.S. 600, 616-17, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974). This Court does not sit for the benefit of particular litigants. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74, 99 L. Ed. 897, 75 S. Ct. 614 (1954). A petition will only be granted for "compelling reasons." Rules of the Supreme Court, Rule 10 (Rev. 1995). A petition is "rarely granted" when the asserted error consists of the "misapplication of a properly stated rule of law." *Id.* The principal purpose of certiorari jurisdiction

is to resolve conflicts among the courts of appeals concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 347, 114 L. Ed. 2d 385, 111 S. Ct. 1854 (1991).

A. The Inapplicability Of The *Knapp* "Contours" Doctrine, Not The Applicability Of Equitable Tolling, Was The Basis For The Ninth Circuit's Decision.

The Court should not grant the petition because the equitable tolling issue was not dispositive in *Fadem*. The Ninth Circuit found that Respondent and her husband did not have constructive notice until the re-survey results were approved in 1980. *Fadem*, 52 F.3d at 206-07. The Ninth Circuit found the *Knapp* "contours" doctrine inapplicable because there was no evidence to support Respondent and her husband knew or should have known of Petitioner's claim under the circumstances. *Fadem*, 52 F.3d at 207.

Given that Respondent and her husband filed the action in 1988, well within the QTA's twelve (12) year period to file an action, resolution of whether equitable tolling could be applied was not necessary to the Ninth Circuit's decision. The Ninth Circuit's conclusion, based on *Irwin*, that equitable tolling could apply was essentially dicta. *Wainwright v. Witt*, 469 U.S. 412, 422, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985).

Petitioner does not ask this Court to review the Ninth Circuit's holding based on the inapplicability of the *Knapp* doctrine nor the Ninth Circuit's finding of constructive notice in 1980. A determination by this Court on whether equitable tolling can be applied to the QTA is unnecessary to this case and will not be dispositive of it. Petitioner is, therefore, essentially requesting an advisory opinion from this Court. The issue does not present a "compelling reason" to exercise certiorari jurisdiction.

B. No Conflict Among The Circuits Exists As To This Issue.

Petitioner admits that there are no other courts of appeal that have considered whether equitable tolling can be applied to the QTA. Petitioner merely states that the issue is "similar" to the issue of whether equitable tolling may be applied in tax refund cases, on which a circuit conflict exists. *Compare Brockamp v. United States*, 67 F.3d 260 (9th Cir. 1995) (tolling allowed) *with Webb v. United States*, 66 F.3d 691 (4th Cir. 1995) (no tolling allowed); *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993) (same).

Petitioner's reliance on the similarity of issues is misplaced, and the apparent similarity of issues is illusory. No courts of appeal have held that *Irwin*'s equitable tolling presumption cannot be applied to the QTA or that the language of the QTA rebuts the *Irwin* presumption.[3] *Webb*, while holding that no tolling is allowed in tax refund cases, found no conflict with cases in other contexts which found that tolling is allowed. *Webb*, 66 F.3d at 696. *Webb* expressly distinguished the cases in other contexts, finding that "[c]onsistent with this broad language [in *Irwin*], *Irwin*'s 'rebuttable presumption of equitable tolling' has since been applied in cases against the federal government other than those arising under Title VII." *Id., citing among others, Fadem*, 52 F.3d at 205-206. *Webb* further noted that "[c]ourts are divided, however, as to whether the rebuttable presumption of equitable tolling applies in tax refund cases." *Webb*, 66 F.3d at 696.

While *Brockamp*, holding that tolling is allowed in tax

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3. Petitioner also relies on *Block v. North Dakota*, 461 U.S. 273, 75 L. Ed. 2d 840, 103 S. Ct. 1811 (1983) and *United States v. Mottaz*, 476 U.S. 834, 90 L. Ed. 2d 841, 106 S. Ct. 2224 (1986) in arguing that *Fadem* is in conflict with this Court's prior decisions. As discussed *infra* Section D.2., however, neither *Block* nor *Mottaz* addressed these issues and they both preceded *Irwin*.

refund cases, directly conflicts with *Webb* and *Oropallo*, that conflict is irrelevant in determining whether there is a circuit conflict in QTA cases. *Webb* recognized this conclusion; the Court should recognize it here.

The "principal purpose" of certiorari jurisdiction is, therefore, not implicated in this case. The mere conceptual similarity of the issues does not present a "compelling reason" for certiorari jurisdiction. Resolution of this quiet title action brought by Respondent and her husband should not be delayed by holding the instant petition until a potential resolution of the circuit conflict in the tax refund cases.

C. The Issue Does Not Otherwise Present A Compelling Federal Question.

Petitioner asserts that certiorari jurisdiction is warranted because the QTA is addressed to an important aspect of the sovereignty of the United States. Petitioner, however, engages in faulty reasoning in analogizing the sovereign interests of the government in taxation to its interests in property ownership disputes.

Contrary to Petitioner's suggestions, the issue in this case has nothing to do with the Constitutional powers of Congress in controlling public lands. The issue in this case has nothing to do with Congress' "sovereign rights" to grant public lands for specific uses nor with Congress' "sovereign rights" to regulate uses on public lands.

The issue here only relates to whether courts may apply equitable principles to the QTA's statute of limitations. Quiet title actions in equity have long been used to enforce the "private rights" of property owners in boundary disputes. The nature of this case is wholly inapposite to the tax refund cases, which are

not "even comparable to suits that can be brought against private litigants." *Webb*, 66 F.3d at 697. As found determinative in *Webb*, taxes are "different" because they are the "life-blood of government." *Id.* at 697-98.

Unlike the tax refund cases, "comparable suits" to quiet title between private litigants have long been in existence. The "difference" relied on in the tax refund cases is not the fact that one of the parties is the government. The tax refund cases implicate the government's paramount sovereign right to tax its citizens in order to remain operational. Petitioner cannot escape the fundamental notion that property boundary disputes, in contrast to the tax refund cases, are in the nature of private rights.

Because the interests at stake here are in the nature of private rights, the issue does not present a "compelling reason" for the exercise of certiorari. If Petitioner's assertion were accepted, every federal question would be worthy of certiorari because, regardless of the nature of the action, Congress always acts under the Constitution. No case could apply equitable tolling against the government because the government always exercises a "sovereign right" when it acts. These conclusions were clearly rejected by this Court in *Irwin*.

D. This Court Should Not Review *Irwin*.

Petitioner asserts that review of *Irwin* is necessary because *Irwin*'s application to the QTA will expose Petitioner to stale claims concerning vast holdings of public lands in the Ninth Circuit. None of Petitioner's assertions, however, justify a review of the general rule created by *Irwin*.

1. This Court Previously Considered And Disposed Of Petitioner's Contentions In Irwin.

Six years ago in *Irwin*, this Court clearly resolved the issue of whether equitable tolling is presumptively applicable and when that presumption is rebutted. Chief Justice Rehnquist, delivering the opinion of the Court, stated:

> [A] continuing effort on our part to decide each case on an ad hoc basis, as we have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. **We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government. . . . Once Congress has made [a waiver of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable in private suits, amounts to little, if any, broadening of the congressional waiver.** Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. **We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.**

Irwin, 498 U.S. at 95-6. (Emphasis added.)

Contrary to Petitioner's assertions, this Court neither required that the federal statute in question also create a private right of action to apply the rebuttable presumption nor found that the presumption would be rebutted where no private right of action exists. Holding expressly that it was creating a "general rule to govern the applicability of equitable tolling in suits against the Government" (*Id.* at 95), the Court did not impose the limits on its holding that Petitioner now asserts.

2. Block and Mottaz Are Neither Controlling Nor Persuasive.

This Court did not previously consider these issues in *Block* and *Mottaz*. In *Block*, the Court considered whether Congress intended to exempt the states from the QTA and whether an officer suit could be maintained under the QTA. *Block*, 461 U.S. at 280. In *Mottaz*, the Court considered whether Congress intended to exempt Indians from the QTA and its statute of limitations. *Mottaz*, 476 U.S. at 841. Neither case expressly considered whether equitable tolling could be applied against the government.

To the extent that *Block* and *Mottaz* contain any language supportive of Petitioner's assertions, that language can only be considered dicta and clearly has no continuing validity after *Irwin*. This conclusion is confirmed by this Court's reliance in *Block* and *Mottaz* on *Soriano v. United States*, 352 U.S. 270, 1 L. Ed. 2d 306, 77 S. Ct 269 (1957). *Block*, 461 U.S. at 287; *Mottaz*, 476 U.S. at 841-42. In *Irwin*, this Court expressly considered the impact of *Soriano* and concluded that *Soriano* did not preclude the equitable tolling presumption. *Irwin*, 498 U.S. at 94-5. The Court found that despite the stringent language in *Soriano*, the Court would nevertheless apply the presumption. *Irwin*, 498 U.S. at 94-5. This Court expressly rejected Justice White's dissenting opinion that *Soriano* did preclude application of the presumption. *Irwin*, 498 U.S. at 94-5.

3. Webb Makes The Distinction Between Tax Refund Cases And The QTA Clear.

Webb's analysis in considering yet rejecting *Irwin*'s rebuttable presumption in tax refund cases is instructive in refuting Petitioner's contentions in this case. *Webb* noted the key rationale for *Irwin* is that the government should be treated in the same manner as a private defendant. *Webb*, 66 F.3d at 697. *Webb* recognized and agreed with other courts, including the Ninth Circuit in *Fadem*, that *Irwin*'s rationale justified its application in cases other than tax refund cases. *Webb*, 66 F.3d at 697, *citing among others Fadem*, 52 F.3d at 205-06.

Webb distinguished the other cases applying *Irwin*'s presumption on several grounds. *Webb* found that taxation is a paramount "sovereign right," not in the "nature of private rights." *Id.* at 697-98. *Webb* also found that tax refund cases are not "comparable" to suits between private litigants. *Id.* at 697. *Webb* further found that *United States v. Dalm*, 494 U.S. 596, 108 L. Ed. 2d 548, 110 S. Ct. 1361 (1990), rendered nine months prior to *Irwin* but unaddressed by *Irwin*, was a strong indication by the Court that *Irwin*'s presumption did not displace the strict time limits of the Internal Revenue Code ("IRC"). *Webb*, 66 F.3d at 698.

Moreover, citing *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993), which relied heavily on *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991), *Webb* agreed with *Oropallo* and found that the double threshold statutory scheme of the relevant IRC provisions was akin to the statute of repose found by *Lampf* in the Securities Exchange Act of 1934's one and three-year statutory scheme and not akin to a statute of limitation. *Webb*, 66 F.3d at 699-700. *Webb* concluded that this distinction between a statute of repose and a statute of limitation was crucial in not

applying *Irwin* because the statute evinced an absolute "outside limit," rebutting effectively *Irwin*'s presumption applied to statutes of limitations.[4]

Unlike the statutory schemes at issue in *Lampf* and *Webb*, Congress did not evince an intent to create a statute of repose in the QTA's statutory scheme. Congress created a typical single threshold scheme triggered not by the time the government claimed ownership but by the time the disputing property owner "knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). Even if this language is considered more stringent than that in *Irwin*, this language plainly does not "manifest a different [C]ongressional intent with respect to equitable tolling" necessary to rebut the presumption. *Irwin*, 498 U.S. at 95.[5]

Petitioner's attempts to discern a statute of repose in the legislative history of the QTA is unavailing. The plain meaning of the statute does not evince a Congressional intent to create a statute of repose. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985), *quoting Park'n Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194, 83 L. Ed. 2d 582, 105 S. Ct. 658 (1985)(the Court begins with the language employed by Congress and assumes that the ordinary meaning of that language accurately expresses the legislative purpose).

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4. *Webb* further noted the significance of the distinction between a statute of repose and statute of limitation. A statute of limitation is a procedural device that operates as a defense to limit the remedy available from an existing cause of action, whereas a statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. *Id.* at 700-01.

5. The Court expressly considered the stringent language in *Soriano*, but found nevertheless that it did not "manifest a different congressional intent" to avoid the presumption. *Irwin*, 498 U.S. at 95.

Webb's reasoning and conclusions demonstrate that certiorari should not be granted here. A paramount "sovereign right," such as taxation, is not implicated. This QTA action is "comparable" to an action between private litigants to enforce private rights. Congress did not create a statute of repose in the QTA's statutory scheme. As noted by the Ninth Circuit, the QTA is a typical statute subject to *Irwin*'s presumption. No courts have disagreed with the Ninth Circuit, and, based on *Webb*, there is no reason to believe that any courts will disagree if this issue arises again.

4. Petitioner's Concern That Irwin's Application Will Unduly Expose Petitioner To Stale Claims Is Unnecessarily Alarmist.

Petitioner wholly fails to consider *Irwin*'s recognition of judicial safeguards in applying equitable principles. *Irwin*, 498 U.S. at 96. Federal courts typically extend equitable relief only sparingly, and they do not extend relief to the "garden variety claim of excusable neglect." *Id.* This Court, contrary to Petitioner, has recognized that judicial restraint can be trusted to avert overwhelming litigation against Petitioner on equitable principles. *Id.*[6]

There is no substantial reason to believe that the Ninth Circuit's decision in this case will unduly expose Petitioner to "stale claims concerning the vast holdings of public lands in the Ninth Circuit." The courts can be trusted to continue their sparing application of equitable principles, including equitable tolling, to protect Petitioner from stale claims.

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6. Notably, in *Git v. Dept. of the Treasury*, 1996 U.S. App. LEXIS 86 (8th Cir. Jan. 4, 1996), the Eighth Circuit had no difficulty in finding that, even if it were to apply tolling principles under *Irwin* to the tax refund case before it, the party seeking to benefit did not provide sufficient grounds to justify equitable tolling against the government. *Id.* at 3.

CONCLUSION

For all these reasons, Respondent respectfully requests that this Court deny the petition. Respondent further requests that this Court not hold the petition pending potential petitions in *Brockamp* or *Webb*. Regardless of whether this Court decides to review either or both of these tax refund cases and regardless of any decision by the Court in those cases, the Ninth Circuit's decision in this case remains unaffected. The Ninth Circuit's holding was based on its finding that the *Knapp* "contours" doctrine was inapplicable, and that, therefore, Respondent's action was brought well within the QTA's statute of limitations. Petitioner does not seek review of this dispositive determination.

Moreover, *Fadem* neither conflicts with any other circuits nor with any prior decisions of this Court. *Irwin* clearly applies to the QTA, and this is made clear by *Webb*. Petitioner's skepticism of judicial restraint should not be the basis for exercising this Court's certiorari jurisdiction.

Respectfully submitted,

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